Supreme Court, U.S.
FILED
MAR 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1409
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

DAVID C. WALENTAS,

Petitioner,

v.

KENNETH LIPPER, JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4, and JOHN DOE #5,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETER L. ZIMROTH,
Corporation Counsel,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 566-6037 or 4375

LEONARD J. KOERNER,*
JEFFREY SCHANBACK,
EDWARD F.X. HART,
ELIZABETH DVORKIN,
of Counsel.

*Counsel of Record

March 21, 1989.

21 pp

COUNTER-STATEMENT OF THE QUESTION PRESENTED

When no case law has held that loss of a conditional designation as developer of a project implicates a liberty interest, is the qualified immunity established by Harlow overcome by alleging that the dedesignation was done with a malicious intent?

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF THE QUESTION PRESENTED	i
TABLE OF AUTHORITIES.....	iii
COUNTER-STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	
THE LOWER COURT'S DECISION PROPERLY APPLIED THE HARLOW STANDARD AND FOUND A QUALIFIED IMMUNITY BECAUSE NO LAW CLEARLY ESTABLISHED A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN THE STATUS OF CONDITIONAL DESIGNATION AS DEVELOPER OF A GOVERNMENTAL PROJECT	7
CONCLUSION	16

TABLE OF AUTHORITIES

	Page
Cases:	
Anderson v. Creighton, 483 U.S. 635 (1987)	4, 7, 8
Board of Regents v. Roth, 408 U.S. 564 (1972)	9
Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961)	9, 12
Conset Corp. v. Community Services Administration, 655 F.2d 1291 (D.C. Cir., 1981)	10
Davis v. Scherer, 468 U.S. 183 (1984)	7, 8
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	5, 8
Hobson v. Wilson, 737 F.2d 1 (D.C. Cir., 1984), cert. denied sub nom. Brennan v. Hobson, 470 U.S. 1084 (1985)	14
Lynch v. Cannatella, 810 F.2d 1363 (5th Cir., 1987)	14
Malley v. Briggs, 475 U.S. 511 (1985)	4

Myers & Myers, Inc. v. U.S. Postal Service, 527 F.2d 1252 (2d Cir., 1975) 10, 12

Neu v. Corcoran, ___ F.2d ___, (2d Cir., 1989) 14

Old Dominion Diary Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir., 1980) 10, 12

Paul v. Davis, 424 U.S. 693– (1976) 9

Shabazz v. Coughlin, 852 F.2d 697 (2d Cir., 1985) 14

Smith & Wesson, Division of Bangor Punta Corp. v. U.S., 782 F.2d 1074 (1st Cir., 1986) 10

Transco Security, Inc. of Ohio v. Freeman, 639 F.2d 318 (6th Cir.), cert. denied, 454 U.S. 820 (1981) 10, 11

Zweibon v. Mitchell, 720 F.2d 162 (D.C. Cir., 1983), cert. denied, 469 U.S. 880 (1984) 14

Statutes:

42 U.S.C. §1983 3

No. 88-1409
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

DAVID C. WALENTAS,

Petitioner,

v.

KENNETH LIPPER, JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4, and JOHN DOE #5,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTER-STATEMENT OF THE CASE

We adopt the statement of facts as explained in the Court of Appeals opinion at A2 - A9 with these additions:

After the conditional designation of petitioner's real estate company, Two Trees Management Company, was revoked in March 1984, petitioner's companies continued to do business. One of petitioner's companies

leased approximately two hundred and sixty thousand square feet to the New York State Department of Labor in 1985 (232-33).[1] Another company obtained a lease to rent a parking lot from New York City between July 1985 and June 1986 (280, 284). Moreover, New York City officials continued to negotiate with plaintiff over the Fulton Landing project (261-62). Plaintiff stated in a deposition that the negotiations foundered over his unwillingness to drop his lawsuits against the City and City officials (262-63, 268).

Plaintiff also stated in his deposition that he is a real estate developer and investor, owning properties nationwide but

---

[1]Citations preceded by an "A" are to the Appendix to the Petition for Certiorari. Citations without a letter prefix are to the Joint Appendix submitted to the Court of Appeals.

primarily in New York City (203, 209). Plaintiff's business dealings in 1986 included buying land in Phoenix and selling apartments in addition to doing renovations on the buildings at Fulton Landing (246).

The Second Circuit Opinion

The Court first disposed of Mr. Walentas' claim that his company's conditional designation as developer of the Fulton Landing project gave him a property interest protected by 42 U.S.C. §1983. Since the parties' "memorandum of understanding" provided only that they would try to negotiate a "memorandum of intent" and ultimately negotiate a contract, since the negotiations could be terminated "at any time," and since the contract would ultimately have to be approved by the New York City Board of Estimate, the Court found: (A13-14): "Walentas' selection as developer would have been a discretionary

determination by a political body which . . . plaintiff 'had no right to expect.'"

The Court then assumed that Mr. Walentas had a "protected liberty interest" but found that Mr. Lipper had qualified immunity precluding liability for invading that interest (A17). The Court explained the standard adopted by this Court (A18):

> ["W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action ... assessed in light of the legal rules that were 'clearly established' at the time it was taken." Anderson, 107 S. Ct. at 3038 (1987) (quoting Harlow, 457 U.S. at 819-19). Moreover, the legal rule alleged to be "clearly established" at the time must be sufficiently particularized: "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.... [I]n the light of preexisting law that unlawfulness must be apparent." Anderson, 107 S. Ct. at 3039 (citing Malley v. Briggs, 475 U.S. 511, 528 (1985); Davis v. Scherer, 468 U.S. 183, 191, 195 (1984).

The Court analogized Walentas to an applicant for governmental employment and found that a liberty interest for loss of such status was not "clearly established" in 1984 (A19).

The Court specifically rejected the argument plaintiff raises in his petition that the test of "objective legal reasonableness" means something other than an inquiry into whether it had been clearly established that a constitutional right would be violated by the defendant's actions (A20):

> ... Harlow and its progeny make clear that the objective legal reasonableness of an official's actions must be viewed in light of the action's relationship to the clearly established law at the time, and not to some more general standards of reasonable and appropriate governmental conduct.

Judge Van Graafeiland concurred in the result because "no reasonably competent official" would have known that Mr. Lipper's actions violated plaintiff's constitutional

rights. He described the "constitutional status" of public contractors as "in a state of uncertainty and flux." (A22).

REASONS FOR DENYING THE WRIT

THE LOWER COURT'S DECISION PROPERLY APPLIED THE HARLOW STANDARD AND FOUND A QUALIFIED IMMUNITY BECAUSE NO LAW CLEARLY ESTABLISHED A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN THE STATUS OF CONDITIONAL DESIGNATION AS DEVELOPER OF A GOVERNMENTAL PROJECT.

The Court below properly applied this Court's well established standard for the application of qualified immunity under 42 U.S.C. §1983. As this Court has repeatedly explained, whether a government official receives qualified immunity "generally turns on the objective legal reasonableness of the action assessed in light of the legal rules that were clearly established at the time it was taken." Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 3038 (1987) (quotations and citations omitted). See also Davis v. Scherer, 468 U.S. 183 (1984); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Plaintiff argues that the test of "objective legal reasonableness" looks to something other than whether Mr. Lipper's alleged actions violated a clearly established constitutional right. He argues that even if the right was not clearly established, no immunity can exist if Mr. Lipper acted with malice. (Petition Point I). This position was discussed and firmly rejected in Harlow where this Court held that subjective good faith is not part of the standard for qualified immunity. 457 U.S. at 815-818. As this Court held in Harlow and has reiterated in subsequent cases, the only relevant question is whether the governmental official's conduct violated a "clearly established" constitutional right. Harlow, 457 U.S. at 818; Davis, 468 U.S. at 197; Anderson, 107 S. Ct. 3039.

The Court below had no difficulty in concluding that no clearly established

constitutional right is at issue in this case. Petitioner does not argue that any court had ever found a liberty interest in his circumstances. This Court has found a protected liberty interest only where the government stigmatizes a citizen and deprives him or her of government employment. See Paul v. Davis, 424 U.S. 693 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972). Moreover, even in cases involving the loss of employment, a liberty interest is not implicated if "other employment opportunity" is available. See Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 898 (1961).

Petitioner cannot claim that he was a government employee. Instead he asserts that he falls within the line of cases finding a liberty interest when a contractor has been stigmatized and barred from doing business with the government. See Smith & Wesson,

Division of Bangor Punta Corp. v. U.S., 782 F.2d 1074 (1st Cir., 1986); Conset Corp. v. Community Services Administration, 655 F.2d 1291 (D.C. Cir., 1981); Transco Security, Inc. of Ohio v. Freeman, 639 F.2d 318 (6th Cir.), cert. denied, 454 U.S. 820 (1981); Myers & Myers, Inc. v. U.S. Postal Service, 527 F.2d 1252 (2d Cir., 1975).

But those cases hold that a liberty interest is not implicated unless the plaintiff can demonstrate, at a minimum, that he or she has been foreclosed from doing business with the government. A liberty interest is implicated only when the government "effectively bars a contractor from virtually all Government work ...." Old Dominion Diary Products, Inc. v. Secretary of Defense, 631 F.2d 953, 955 (D.C. Cir., 1980). See also Smith & Wesson, 782 F.2d at 1081 (1st Cir.) (same); Transco Security v. Freeman, 639 F.2d at 321 (6th Cir.) (same).

Plaintiff has not been barred from government work. Accepting plaintiff's allegations as true, he has lost government business because of the allegedly defamatory Department of Investigation ("DOI") report (18, 254, 271-72). He has not, however, been foreclosed from doing business with New York City or other governments. After the DOI report was released in 1984, plaintiff entered into an agreement with the City to lease a parking lot (284). Also after release of the DOI report, plaintiff entered into a major lease with New York State (232). Moreover, the City reconsidered its decision to dedesignate plaintiff's company and negotiations over the Fulton Landing project continued for years after release of the report until, in plaintiff's version, they ended because he refused to drop his litigation over the project (261-62, 268, 286-87). Although the Fulton Landing

development may well have been a primary focus of plaintiff's business activity, the loss of the opportunity to negotiate one deal is not a deprivation of a constitutionally protected liberty interest. Old Dominion Dairy, 631 F.2d 953; Myers & Myers, 527 F.2d 1252.

Moreover, plaintiff has not lost the right to practice his profession; he has interests apart from his government contracts (203). See McElroy, 367 U.S. at 898 (no liberty interest where opportunities for non-governmental employment were available). Plaintiff has bought and sold properties in Phoenix since his dedesignation and is negotiating to buy other properties there (223, 246). He is currently renegotiating a project with the New York City Folk Art Museum which allegedly fell through because of the DOI report (223). Plaintiff is also renovating his Fulton

Landing properties (246). Given these governmental and non-governmental projects within and outside New York City, it cannot be said that plaintiff has been foreclosed from practicing his profession of real estate developer and investor (203). Thus, the Court below properly found that the law in 1984 did not "clearly establish" that plaintiff had a federally protected liberty interest in his company's status as conditionally designated developer of the Fulton Landing project.

Finally, petitioner's claim that the Second Circuit will find law "clearly established" only when a prior case is on all fours with the one under review (Petition at 12 -21) is simply wrong. When it has had occasion to describe its approach, the Second Circuit has stated: "The very action in question need not previously have been held unlawful, but the unlawfulness

must be apparent in light of preexisting law." Neu v. Corcoran, ___ F.2d ___, Slip. op. at 1731 (2d Cir., 1989) (discussing when law clearly establishes a liberty interest). See also Shabazz v. Coughlin, 852 F.2d 697, 701 (2d Cir., 1988). (discussing when law is clearly established).

When, as in the case at bar, the plaintiff alleges violation of a constitutional right that has not been "'clearly established' by any reasonable definition of the phrase" the Second Circuit has readily applied the qualified immunity standard. In these circumstances, the standard presents no difficulties. See Zweibon v. Mitchell, 720 F.2d 162, 169 (D.C. Cir., 1983), cert. denied, 469 U.S. 880 (1984); Hobson v. Wilson, 737 F.2d 1, 26 (D.C. Cir., 1984), cert. denied sub nom. Brennan v. Hobson, 470 U.S. 1084 (1985) (no clearly established right). See also Lynch v. Cannatella, 810

F.2d 1363, 1375 (5th Cir., 1987) (clearly established right). Accordingly, this case does not present the problem of defining the contours of the "clearly established" standard, which petitioner asks this Court to review.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

March 21, 1989

Respectfully submitted,

PETER L. ZIMROTH,
Corporation Counsel,
Attorney for Respondents,
100 Church Street,
New York, N.Y. 10007
(212) 566-6037 or 4375

LEONARD J. KOERNER,*
JEFFREY SCHANBACK,
EDWARD F. X. HART,
ELIZABETH DVORKIN,
of Counsel.

*Counsel of Record.